

[1] percent. And he explained that it was due to the on-premise
[2] music use data which we have from DMX. He related the direct
[3] licenses that were in-house and how that would have impacted
[4] the on-premise reporting and he said when you weighted the two
[5] together it dropped the overall savings rates down to 20, 22
[6] percent.

[7] Q. And did you and he discuss in any greater detail the nature
[8] of the on-premise reporting data that is provided to BMI by
[9] DMX?

[10] A. I don't think we went into great length about what was
[11] supplied by DMX to BMI.

[12] Q. Why don't we explore the rest of that topic with
[13] Mr. Laughlin when he gets on the stand.

[14] I would like to conclude my examination with some
[15] questions about DMX' direct licensing program. BMI's
[16] affiliated composers and music publishers are entitled, under
[17] this arrangement with BMI, to license the public performance
[18] rights in their musical compositions directly to users such as
[19] DMX in lieu of BMI if they choose to do that; is that correct?

[20] A. Yes, we have non-exclusive rights.

(Continued on next page)

[21]
[22]
[23]
[24]
[25]

[1] **BY MR. RICH:**

[2] Q. BMI understands that this is a decision that's to be made
[3] by its affiliates without interference from BMI, is that
[4] correct?

[5] A. Absolutely.

[6] Q. Prior to the direct licensing initiative engaged in by DMX
[7] beginning in 2006, what was the prevalence, to your knowledge,
[8] of such direct licensing of BMI repertoire works by members of
[9] the commercial music service industry?

[10] A. By the commercial music service industry? I think it was
[11] nil.

[12] Q. Now, there came a time, I take it, when --

[13] A. Mr. Rich, I remember reading something about in the '94 to
[14] the 2004 period that there was talk about direct licensing, but
[15] I'm not sure if it ever came to fruition.

[16] Q. Thank you. Now, putting aside this litigation and what's
[17] come through the discovery record, there came a time when BMI
[18] became aware that DMX was contacting music publishers about
[19] entering into direct license arrangements covering, among other
[20] rights, the grants of music performing rights, is that correct?

[21] A. Yes.

[22] Q. And is it your recollection that BMI came to learn of this
[23] sometime during 2006?

[24] A. I believe that's the time frame, yes, sir.

[25] Q. Is it correct that the manner in which BMI came to learn of

[1] this was information and contacts BMI began to receive from
[2] music publishers who had been approached by DMX?

[3] A. Yes. The music publishers called us on that.

[4] Q. And that included some contacts from the so-called major
[5] music publishers?

[6] A. Yes, sir.

[7] Q. Could you for the record identify who you understand to be
[8] the major music publishers?

[9] A. Sure. There would be four majors within the industry of
[10] publishing. Sony, Universal, Warner Chappel and EMI.

[11] Q. And am I correct that the distributions which they reflect,
[12] at least within the monies received and disbursed by BMI
[13] attributable to the commercial music services industry, that
[14] they, the four collectively, represent about 70 percent of all
[15] publisher distributions?

[16] A. I think that's correct, yes.

[17] Q. Is that about right?

[18] A. Yes.

[19] Q. Now, you and others in senior management -- are you a
[20] member of senior management, by the way?

[21] A. That's a good question. I'm senior vice president of
[22] licensing. I like to consider myself a member of senior
[23] management, but others may not.

[24] Q. I will gladly treat you as such.

[25] A. I appreciate that.

[1] Q. Now you and others in senior management at BMI came to
[2] learn that DMX was offering these music publishers one and a
[3] half times the combined writer and publisher distributions they
[4] reported to DMX that BMI and ASCAP had been making on account
[5] of DMX performances of their music, is that correct?

[6] A. Again, I learned about it from BMI, Mr. Rich, that it was
[7] one and a half times what BMI was paying, the publishers was
[8] being offered one and a half times what BMI was paying.

[9] Q. And in addition in 2006 you and others at BMI were provided
[10] with the basic terms of the agreement that DMX was offering to
[11] potential direct licensing publishers, is that correct?

[12] A. Forgive me. There was two parts to the direct licensing
[13] campaign, and I'm not quite sure of when one happened versus
[14] the other, sitting here today, but I remember getting a term
[15] sheet for one deal and then it subsequently changed somewhat a
[16] couple of steps later in the process.

[17] Q. Let me show you a document that's been premarked as RX 22,
[18] please? Do you recognize this series of e-mails?

[19] A. Yes, I do.

[20] Q. Who is Ann Sweeney?

[21] A. Ann Sweeney is the executive vice president of Warner
[22] Chappel music now. She was I believe the head of business
[23] affairs for Sony Music at this time.

[24] Q. And it was in this capacity that you and she were
[25] communicating?

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[1] A. Yes.

[2] Q. That prior capacity?

[3] A. Correct.

[4] Q. Her e-mail was to you and Alison Smith. Could you for the
[5] record identify who Ms. Smith is?[6] A. Alison Smith is senior vice president of distribution and
[7] performing rights for BMI.[8] Q. So am I correct that in or about August of 2006,
[9] Ms. Sweeney forwarded to you and to Ms. Smith what the re: line
[10] indicates is DMX's direct license proposal?

[11] A. Yes.

[12] MR. RICH: I'd like to offer this if there's no
[13] objection, your Honor?

[14] MR. FITZPATRICK: No objection.

[15] THE COURT: Received.

[16] (Respondent's Exhibit RX 22 received in evidence)

[17] Q. Now, you came to understand, I take it, that the basic form
[18] of agreement that DMX was offering offered publishers their pro
[19] rata share of a pool of \$25 per location, correct?[20] A. Yes, sir. I believe at the time I thought it was \$25 for
[21] BMI.

[22] Q. You later came to understand otherwise?

[23] A. Very -- through discovery process for this trial, yes, but
[24] at the time we believed it was \$25 for the BMI portion.

[25] Q. And what did you subsequently come to understand?

[1] A. They did ask what the others were planning to do, yes, they
[2] did.

[3] Q. I take it you declined to indicate?

[4] A. Absolutely.

[5] Q. Now, as we'll get to in a bit greater detail, at least two
[6] of these majors specifically over time asked BMI to match the
[7] economic terms that had been offered to them by DMX, correct?

[8] A. Yes, sir.

[9] Q. The first of those was Sony, correct?

[10] A. Yes.

[11] Q. And the next was Universal?

[12] A. Yes.

[13] Q. Okay. In which case, these publishers advised BMI, didn't
[14] they, that should BMI match DMX's proposal, those publishers
[15] would forego entering into direct licenses with DMX, correct?

[16] A. Yes.

[17] Q. That was the purpose of the exercise?

[18] A. They said if you could match this, they'd rather stay with
[19] us. They also wanted to understand the dynamics of where we
[20] were with DMX in terms of the licensing of DMX.[21] Q. Now, BMI was interested to meet these requests from its
[22] major affiliates if at all possible, true?

[23] A. True.

[24] Q. BMI had concerns over DMX's direct initiative, didn't it?

[25] A. No. Again, we felt that if a publisher came to us and

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[1] A. That the 25 represented both ASCAP and BMI's portion.

[2] Q. Is it accurate that by the summer of 2006 BMI was contacted
[3] by all four of the major publishers concerning DMX's
[4] marketplace initiative?

[5] A. By the summer of 2006?

[6] Q. Yes.

[7] A. I'm not sure if all four had contacted BMI by that time.

[8] Q. I can show you this excerpt from your deposition, but let
[9] me read it to you first and see if it refreshes you. This is
[10] from line 23 at page 155. You were asked:[11] "Q. You had been advised in the summer of 2006 by each of the
[12] major publishers that they had been approached by DMX
[13] concerning direct licensing?

[14] "A. I believe so, yes.

[15] "Q. And when I say major publishers, you understand that I am
[16] referring to Sony, Universal, Warner Chappel and BMI."

[17] Your answer is "Yes."

[18] A. Was that corrected later to say I wasn't sure if EMI
[19] contacted us?

[20] Q. If so -- I don't know the answer and if so, I accept that.

[21] A. I believe, I know Universal, I know Sony and Warner Chappel
[22] were interested.[23] Q. Is it accurate that the majors who had contacted you, one
[24] or more, were interested in knowing what the others were
[25] planning to do?[1] asked us for, to match an offer they were getting on the
[2] outside to remain with BMI, we'd explore that. We were not
[3] trying to hamper DMX from direct licensing.[4] Q. Do you feel there was a need to somehow level the
[5] information playing field?[6] A. Yes, I did. I felt that DMX was offering, again, at this
[7] time I believe \$25 per location for BMI's music use. They were
[8] paying us \$12 per location. We were seeking \$36 per location,
[9] so we felt they were trading in the middle for this direct
[10] license. We just wanted to make sure the license -- our
[11] affiliates, our writers and publishers understood that our
[12] license was interim, that they were paying at a rate that was
[13] established back in 1987, and that we felt they should have
[14] been at a higher rate and that we were pursuing that in court.
[15] We didn't tell them, we made it absolutely clear on every phone
[16] call that it was their absolute right to directly license. In
[17] no way were we trying to influence them. We were just
[18] providing them information in order to make a sound business
[19] decision.[20] Q. You felt that entities the likes of Sony/ATV Music
[21] Publishing Company, Universal Publishing Company, some of the
[22] largest corporations in the world, were at the risk of being
[23] disadvantaged in their negotiations with DMX unless they were
[24] provided with certain additional information by BMI?

[25] A. They called us seeking that information, Mr. Rich.

[1] Q. In fact, BMI viewed the DMX initiative as competitive with
[2] BMI's own license offerings to the CMS industry, isn't that
[3] true?
[4] A. I actually felt the direct licensing they were paying at
[5] the time, the \$25 per location was higher than what BMI was
[6] getting on an interim basis and we were at a disadvantage by
[7] not being able to match those.
[8] Q. If successful, DMX's licensing initiative stood to reduce
[9] BMI's own collections from DMX and potentially from other CMS
[10] industry participants, isn't that true?
[11] A. I would agree with you that it stood to lessen DMX's
[12] license fees to BMI, as the adjustable fee blanket license
[13] would allow.
[14] Q. It was of no concern to you, however?
[15] A. I'm not sure how it would have played across the rest of
[16] the industry. I would imagine that either, and we've seen this
[17] today, that Play Networks and, I forget, there's one other,
[18] have requested an adjustable fee blanket license on a
[19] going-forward basis. I forget the other service which has. So
[20] ultimately, I do think that it will reduce BMI's fees as they
[21] go out and directly license, as the license should.
[22] Q. And you were also concerned, were you not, that a
[23] successful DMX licensing initiative threatened to reduce the
[24] prevailing fee level for the CMS industry licenses as reflected
[25] in BMI's own license agreements with the industry, correct?

[1] Q. Even to bend BMT's distribution rules a bit to accomplish
[2] it, isn't that true?
[3] A. That's false.
[4] Q. Now, you personally had discussions with the major
[5] publishers concerning DMX's direct license initiative, right?
[6] A. Yes, I did.
[7] Q. In which you advised them that DMX was paying BMI some
[8] three times less than the what you termed new established rate
[9] in the marketplace, is that right?
[10] A. I believe I phrased it DMX was paying us at a rate of 12 to
[11] \$14, which was three times less than the established rate of
[12] 36.36.
[13] Q. And that BMI was hoping to triple the license fees it was
[14] currently receiving from DMX through negotiation or potential
[15] rate litigation, correct?
[16] A. I said we were seeking to get DMX on the same licensing
[17] agreement as every other CMS provider signed on to.
[18] Q. At the time you represented that the going rate was 36.36,
[19] had BMI done any research as to the actual effective rates of
[20] CMS licenses of the type that PX 1293, pardon me, JX 1293
[21] undertakes here?
[22] A. Is that that big document, Mr. Rich?
[23] Q. Mm-hmm?
[24] A. No. But we did estimate that DMX's rate would have been
[25] north of the 36.36.

[1] A. I think it was going to have an impact on our licensing.
[2] Again, if the rate was the standard contract, I'm not sure
[3] where that ultimately would have ended up, Mr. Rich.
[4] Q. If successful, it threatened, did it not, in BMI's
[5] estimation, to lower the royalty levels received by BMI's
[6] affiliates for the performances of their music by DMX, true?
[7] A. I think direct licensing would reduce royalty levels
[8] payable to other affiliates.
[9] Q. Payable to --
[10] A. Other affiliates.
[11] Q. If successful, it might have set a precedent for other
[12] users to attempt to replicate that process, true?
[13] A. I think other users had the right to replicate that
[14] process, yes.
[15] Q. That was viewed as a risk to BMI, correct?
[16] A. I don't think it would be viewed as a risk. I think it was
[17] viewed as this is going to happen.
[18] Q. In fact, BMI is aware of other large users and industries
[19] of users that have indicated a desire to operate under blanket
[20] carveout licenses, isn't that true?
[21] A. Yes, it is true.
[22] Q. And in BMI's senior management's estimation, it was
[23] worthwhile to make an investment to forestall this initiative
[24] from gaining a head of steam, isn't that true?
[25] A. That's false.

[1] Q. Did you do any estimation of the effective rates then being
[2] paid by any of DMX's major competitors?
[3] A. Not at that time.
[4] Q. Now, BMI enlisted its most senior management, did it not,
[5] to weigh its options in responding first to Sony and then to
[6] Universal?
[7] A. Sony again approached us to see if we could match an offer
[8] that DMX made for direct license, and we brought it to the very
[9] senior management group to say here is what Sony has been
[10] offered by DMX, here is what we think we can do, we don't think
[11] we can do that.
[12] Q. The effort involved Mr. Bryant, Del Bryant?
[13] A. Yes it did.
[14] Q. What is his position at BMI?
[15] A. He's president and CEO of BMI.
[16] Q. Did it involve John Cody, did it not?
[17] A. Yes.
[18] Q. Who is Mr. Cody?
[19] A. Executive vice president and COO of BMI.
[20] Q. Did it involve Mr. Marvin Berenson, did it not?
[21] A. Yes.
[22] Q. Who is he?
[23] A. Senior vice president and general counsel of BMI.
[24] Q. Did it involve Ms. Smith who we identified, correct?
[25] A. Yes.

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[1] Q. And you, right?
[2] A. Yes.
[3] Q. Senior team?
[4] A. Yes.
[5] Q. Now, Sony/ATV, which was the first requester of the majors,
[6] controls the rights to songs written by a fair number of
[7] luminaries correct?
[8] A. Yes, sir.
[9] Q. Their catalog includes the Beatles' music?
[10] A. I believe it does. I am, quite candidly, not familiar with
[11] all of their catalog.
[12] Q. Now, am I correct that, we'll do this in more detail with
[13] Ms. Smith, but just as a predicate for understanding this, am I
[14] correct that typically when BMI distributes royalty it
[15] distributes a portion of those royalties to the composer
[16] associated with a musical composition and the remaining portion
[17] to the music publishing company associated with it?
[18] A. Correct.
[19] Q. And if there's a default, it tends to be 50 percent to one
[20] and 50 percent to the other, right? Although there are
[21] variations?
[22] A. I believe that's the case. For every dollar we distribute,
[23] 50 cents is allotted to the publisher, 50 cents is allotted to
[24] the writer.
[25] Q. Now, I take it that Sony's request to BMI was that BMI

[1] Q. Do you have an understanding what task Ms. Smith was
[2] assigning to Ms. Chenault?
[3] A. I believe she was being asked to pull Sony's royalties.
[4] I'm not quite sure of the date span or things like that. But
[5] how much did BMI pay to Sony for the DMX distribution.
[6] Q. And that was for purposes of assisting BMI senior
[7] management in evaluating whether it could match the DMX offer?
[8] A. I believe so.
[9] Q. Is it your recollection that the attached information to
[10] this e-mail constitutes the workup she did?
[11] A. I'm not sure if this is the final product of it all, but it
[12] was the initial phases of it.
[13] Q. Iteration of it?
[14] A. Yes, sir.
[15] Q. Okay.
[16] MR. RICH: I'd offer this in evidence at this point,
[17] your Honor?
[18] MR. FITZPATRICK: No objection.
[19] THE COURT: Received.
[20] (Respondent's Exhibit RX 34 received in evidence)
[21] Q. Now, Sony put considerable pressure on BMI in the period
[22] the summer '07 into the fall '07 to get them a response, is
[23] that accurate?
[24] A. I would say that's accurate.
[25] Q. Let me show you a document that's been premarked as RX 24.

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[1] match the publisher's share of what DMX was offering to it,
[2] correct?
[3] A. I believe that's the case, yes.
[4] Q. And in furtherance of this interest, Sony furnished BMI
[5] with the specifics of the offer that had been made to it by
[6] DMX, is that correct?
[7] A. Yes, it is.
[8] MR. RICH: May I have one second?
[9] (Pause)
[10] Q. Now, BMI evaluated that offer, that is, the DMX offer, to
[11] see if it could match it, is that correct?
[12] A. Yes, sir.
[13] Q. Let me show you a document that's been premarked as RX 34.
[14] You'll see this is an e-mail chain starting with you at the
[15] bottom, addressed to Ms. Smith and then a series of other
[16] e-mails. Can you identify Vinolla Chenault please?
[17] A. Yes Vinolla Chenault was assistant vice president working
[18] for Alison Smith.
[19] Q. In June of 2007, Ms. Smith per this e-mail writes to
[20] Ms. Chenault, "Well, without going into much detail, see below.
[21] I will explain on Monday. So without hesitation I need you to
[22] do the same workup for DMX on Sony as you did for XM. I'm so
[23] sorry, but we got to get it done. We can do the others later.
[24] Hope you have a good weekend." Do you see that?
[25] A. Yes, I do.

[1] October 26, 2007 e-mail from you to Mr. Bryant, Mr. Cody and
[2] Alison Smith?
[3] A. Yes.
[4] Q. Do you recall preparing this e-mail in or around this time?
[5] A. Yes, I do.
[6] MR. RICH: Offer this in evidence, your Honor?
[7] MR. FITZPATRICK: No objection.
[8] THE COURT: Received.
[9] (Respondent's Exhibit RX 24 received in evidence)
[10] Q. Notice in the second paragraph of this e-mail it states,
[11] "Sony called me this morning," meaning you, "and said that
[12] Marty is pushing for an answer." Who is Marty?
[13] A. Marty Vandier is the CEO of Sony Music Publishing.
[14] Q. And you continue to say, "I told them that we were spread
[15] out around the country but that Del," meaning Mr. Bryant?
[16] A. Yes.
[17] Q. BMI CEO?
[18] A. Yes.
[19] Q. "Would be calling Marty at his house." Correct?
[20] A. Yes.
[21] Q. We'll come back to this memo in a few minutes as to the
[22] denouement, but I want to show you a document that's premarked
[23] as RX 27. This is an October 29, 2007 e-mail from you to
[24] Mr. Cody, and you recall preparing this e-mail?
[25] A. Yes, I do.

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[1] **MR. RICH:** Offer this document in evidence?

[2] **MR. FITZPATRICK:** No objection, your Honor.

[3] **THE COURT:** Received.

[4] (Respondent's Exhibit RX 27 received in evidence)

[5] **Q.** This e-mail you write, "Hey, John, I've updated the work
[6] sheet with some better numbers. Alison," which I take it as a
[7] reference to Alison Smith?

[8] **A.** Yes.

[9] **Q.** "And I are talking with Del about it this afternoon and
[10] then he is scheduled to call Marty at 5:00 p.m., not that
[11] close..." Do you see that?

[12] **A.** Yes, I do.

[13] **Q.** So this back and forth with Sony, I take it, culminated in
[14] or about late October of 2007, is that correct?

[15] **A.** That is correct.

[16] **Q.** And I take it that at the end of the day BMI determined
[17] that it would not match DMX's offer to Sony, correct?

[18] **A.** That is correct.

[19] **Q.** And the reason resulted at least in significant part from
[20] BMI's determination that Sony had misinterpreted a line
[21] appearing on its periodic BMI royalty distribution statement,
[22] is that correct?

[23] **A.** I don't know if Sony misinterpreted it or not in that
[24] negotiation, in their negotiation with DMX. I know I explained
[25] what was in BMI's line item to Sony. I'm not sure how they

[1] beginning at the second page of RX 27, I take it this reflects
[2] an analysis that BMI had been making of the royalties paid by
[3] BMI to major publishers on account of DMX performances?

[4] **A.** Yes, sir.

[5] **Q.** For a certain period of quarters, correct?

[6] **A.** Yes, sir.

[7] **Q.** And this was prepared specifically to assist BMI in its
[8] consideration of Sony's request that BMI match DMX's offer,
[9] yes?

[10] **A.** Yes.

[11] **Q.** Okay. Now, if we start at the top of the page, the chart
[12] at the top half of this second page, I take it this sets forth
[13] the actual amounts distributed to the four major publishers
[14] attributable to the DMX reporting line on the realized royalty
[15] statements over the reporting periods identified. Is that what
[16] that represents?

[17] **A.** Yes, it does.

[18] **Q.** Then appearing as a footnote to that chart, your Honor,
[19] it's at the bottom left of the top half there starting with DMX
[20] numbers with an asterisk, it states: "DMX numbers above
[21] include royalties from over 200 background music customers and
[22] not just DMX." Did I read that correctly?

[23] **A.** Yes, you did.

[24] **Q.** And then directly below that is a box denominated DMX only?

[25] **A.** Yes.

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[1] then transferred that communication in their negotiation to
[2] DMX.

[3] **Q.** The line item we're talking about is denominated, at that
[4] time was denominated on the distribution statement as DMX, is
[5] that correct?

[6] **A.** That is correct.

[7] **Q.** Let's come back to RX 24, please.

[8] **A.** Yes, sir.

[9] **Q.** The third paragraph you write: "In looking at the attached
[10] schedule, it's very hard to come up with what they are seeking.
[11] Perhaps Sony shared their statement with DMX and DMX used it to
[12] come up with their offer, not knowing or understanding that
[13] other background music providers were included in this line
[14] item. I replicated this approach and just about tied out to
[15] the offer. If this is the case, DMX will be overpaying Sony
[16] and only receiving a fraction of the savings via a carveout
[17] license." You wrote that, correct?

[18] **A.** Yes, I did.

[19] **Q.** And that was accurate, right?

[20] **A.** Yes, it is.

[21] **Q.** All right, now, let's go through, if we can, using the
[22] attachment to RX 27, and understanding, help the Court
[23] understand exactly what it is that your e-mail of three days
[24] earlier was describing.

[25] If you look at the attached analysis, attached

[1] **Q.** And there it's reported, quote, "DMX only accounts for
[2] approximately 27 percent of DMX line on our affiliate
[3] statements," correct?

[4] **A.** Correct.

[5] **Q.** And directly below that, some math is done to demonstrate
[6] that the actual 2006 royalties attributable to DMX
[7] performances, rather than 192,000, according to my notes is
[8] 27 percent of \$192,274, I believe it is, gets you to \$51,914,
[9] is that correct?

[10] **A.** Yes. If you take that full year for 2006 --

[11] **Q.** Yes?

[12] **A.** Which is the bottom half of the top spreadsheet?

[13] **Q.** Right.

[14] **A.** Sony is \$192,274. You would take 27 percent of that for
[15] DMX and that would translate into approximately \$51,914 was
[16] attributable out of that money from DMX.

[17] **Q.** So just to step back and make sure the record is totally
[18] clear, Sony had been receiving statements, as had other music
[19] publishers which among other reporting lines had a line labeled
[20] DMX, yes?

[21] **A.** Anybody whose performance was on a commercial background
[22] service or commercial music service would have received a
[23] statement that said DMX.

[24] **Q.** Right. And so in this case for 2006 that line for Sony
[25] cumulated to some \$192,000, correct?

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[1] A. Yes.

[2] Q. Notwithstanding the label, what this document identifies
 [3] and your prior e-mail elucidates is that while it's labeled
 [4] DMX, in fact the source of income to BMI was not solely DMX,
 [5] but some 200 other reporting background music licensees,
 [6] correct?

[7] A. Correct.

[8] Q. And on deeper analysis, if you isolated out the royalties
 [9] being paid to the majors on account solely of DMX, that's where
 [10] the 27 percent came from, correct?

[11] A. Correct.

[12] Q. Okay. And so when you backed out the real numbers
 [13] attributable to DMX and put it against the offer that had been
 [14] made by DMX, the conclusion was you could not match, match that
 [15] offer to Sony, correct?

[16] A. Yes, it --

[17] Q. Please state it in your own way.

[18] A. Thank you. The concept was since the line item on the
 [19] royalty statement summed numerous background music providers
 [20] into one number, 192,000 in this case labeled DMX, we felt that
 [21] 27 percent represented DMX, the balance represented final fees.
 [22] So if we were going to compare apples to apples comparison with
 [23] what we believed Sony was asking, we had to first try to
 [24] determine what BMI believed would be final fees for DMX, and
 [25] that's where we take the 51,914 and we multiply it by three,

[1] Q. That is what you meant by that, correct?

[2] A. Yes.

[3] Q. Now, on this -- back to the data work on RX 27, on the
 [4] right side of the page appears a box headed 2006 big four
 [5] publisher dollars. Do you see that?

[6] A. Yes. The 1 million 332?

[7] Q. Yes. And I take it this cumulates the earnings of all four
 [8] majors as reported on that DMX reporting line and comes up with
 [9] a total of 1,332,635 and then sets forth the actual amount
 [10] attributable to DMX performances, namely, 27 percent of that
 [11] number or 360,000, is that correct?

[12] A. That is correct.

[13] Q. Okay. And then down a bit further on the right side is
 [14] reported the fact that the big four represents 70 percent of
 [15] total distributions. Do you see that?

[16] A. Yes, I do.

[17] Q. And I take it as we established that was meant at least
 [18] relating to DMX?

[19] A. That is true.

[20] Q. And below that --

[21] A. Just to clarify the way I got there.

[22] Q. Yes.

[23] A. If I, in this box labeled directly under the big four
 [24] publisher dollars it says 2006 DMX license fees of \$1,286,000.

[25] Q. Yes.

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[1] because the rate would increase from 12 to 36 in our minds and
 [2] then over a three-year period. Then we would compare that to
 [3] the DMX number in and of itself.

[4] Secondly, we would add everything together to see if
 [5] we came up with it closer.

[6] Q. Coming back to RX 24 for a minute, the prior document we
 [7] looked at and the cover memo.

[8] A. Mm-hmm.

[9] Q. In the paragraph I had read, the third paragraph I read to
 [10] you previously, you reached the -- you inferred, did you not,
 [11] that DMX had misconstrued the royalty dollars communicated to
 [12] it by Sony as part of their negotiations in coming up with its
 [13] own proposal, correct?

[14] A. I assume that could have happened. Again, I didn't know if
 [15] Sony was trying to negotiate with BMI. I didn't know if they
 [16] were using it, but at this point in time I had to assume
 [17] something and I assume that's what happened.

[18] Q. And that to the degree that DMX taking that royalty line at
 [19] its face value itself would have inferred that 100 percent of
 [20] that sum rather than 27 percent of that sum reflected actual
 [21] BMI distributions to Sony. In formulating its own proposal to
 [22] Sony, you report, in that situation DMX will be overpaying Sony
 [23] and only receiving a fraction of the savings via carveout
 [24] license, correct?

[25] A. That is correct.

[1] A. I took 20 percent off. Again, assuming a 20 percent
 [2] overhead rate to get to the million 29, divided it evenly
 [3] between writer and publisher, and then just simply divided the
 [4] 360 by the 514 and that got me to 70 percent.

[5] Q. Thank you. And if we keep going down that right hand
 [6] column, we see that reported are the respective shares of the
 [7] big four in relation to the distribution showing Sony at
 [8] 14 percent, correct?

[9] A. Yes.

[10] Q. And Universal at 29 percent?

[11] A. Yes.

[12] Q. Those totals add up to 100 percent of the 70 percent, is
 [13] that correct?

[14] A. That is correct.

[15] Q. Now, in October of 2007, I take it, BMI advised Sony that
 [16] it was not going to match BMI's proposal, is that correct?

[17] A. That is correct.

[18] Q. And specifically, you told Sony, did you not, you
 [19] personally did, about this data issue underlying the
 [20] determination, correct, the 27 percent issue?

[21] A. Yes, I did.

[22] Q. You did that both in a phone call to the Sony inside lawyer
 [23] who was involved, correct?

[24] A. Correct.

[25] Q. And in a subsequent e-mail confirmation, is that correct?

[1] A. Yes, it is.

[2] Q. Let me show you what's in evidence as JX 1313. This is two
[3] redacted e-mails. At the bottom there's one from you to Jonas
[4] Kant at Sony/ATV?

[5] A. Yes.

[6] Q. Who is he, please?

[7] A. He's the head of business affairs for Sony/ATV. I'm not
[8] quite sure of his exact title.

[9] Q. Do you recall writing this note to Mr. Kant?

[10] A. I do.

[11] Q. This is already in evidence. We don't need to offer it.
[12] Let me read into the record this one paragraph. "Jonas, I just
[13] wanted to follow up on the voice mail I just left to you. It
[14] was really good speaking with you on Monday. While we were
[15] disappointed that we could not meet the number you asked us to
[16] match via your DMX offer, I'm pleased that it worked out for
[17] you." What is that a reference to?

[18] A. That they decided that this was their business decision,
[19] they decided to go with DMX and I was just letting them know
[20] that while BMI was disappointed you wouldn't be keeping the
[21] catalog here, we're happy you made your decision.

[22] Q. You go on to say, "I was glad to have the opportunity to
[23] explain the composition of the line item on your royalty
[24] statement titled DMX. As we discussed, this line also includes
[25] other royalties from other background music providers and in

[1] AFTEROON SESSION
[2] 2:20 p.m.

[3] BY MR. RICH:

[4] Q. Good afternoon, Mr. O'Neill.

[5] A. Good afternoon, Mr. Rich.

[6] Q. You will be happy to know we are nearing the end of this.
[7] Before lunch we discussed BMI's consideration of a
[8] request from Sony, ATV publishing in relation to a proposal it
[9] had received from DMX, yes?

[10] A. Yes.

[11] Q. I would like to conclude by discussing the Universal
[12] counterpart to that.

[13] I take it that at the same time that BMI was deciding
[14] whether to match DMX's offer to Sony it received a similar
[15] request from Universal music publishing, correct?

[16] A. Correct.

[17] Q. And the final decision as to how to respond to Universal
[18] was not made until following BMI's determination not to
[19] accommodate Sony's request, correct?

[20] A. Yes, sir.

[21] Q. It happened after that?

[22] A. Yes, sir.

[23] Q. And, in fact, the decision on BMI's part how to respond to
[24] Universal wasn't made until after Sony entered into its direct
[25] license agreement with DMX, yes?

[1] fact DMX only accounts for approximately 25 percent," is that
[2] right?

[3] A. That's right.

[4] Q. That was the conclusion we were discussing although we
[5] talked about 27 percent a few minutes ago, correct?

[6] A. Yes.

[7] Q. Now, I take it BMI did not advise DMX of the reality of
[8] this reporting line, did it?

[9] A. No, we did not.

[10] Q. As to what it represented or didn't?

[11] A. No, we did not.

[12] **MR. RICH:** Your Honor, this is a good time to break
[13] for lunch, and I hope to conclude within 30 minutes after
[14] lunch.

[15] **THE COURT:** Okay. Thank you very much. We will
[16] recess until, I think probably 2:10 is probably safe.
[17] (Luncheon recess)

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[1] A. Yes. It post-dated Sony.

[2] Q. And this time BMI did put together an economic package
[3] designed to satisfy Universal, correct?

[4] A. Correct.

[5] Q. And thereby to avert Universal also from entering into a
[6] direct license with DMX, right?

[7] A. Yes. We matched what DMX was offering.

[8] Q. And this offer to Universal took the form of a three-year
[9] guarantee; is that right?

[10] A. That is correct.

[11] Q. Okay.

[12] Which guarantee was against future monies that might
[13] become payable to Universal in the form of BMI royalty
[14] distributions on account of DMX commercial performances, right?

[15] A. Yes.

[16] Q. Commercial music performances?

[17] A. Yes, sir.

[18] Q. And which guaranteed sums were assured to Universal
[19] irrespective of whether such future royalties earned out the
[20] guarantees; is that right?

[21] A. That is right.

[22] Q. Okay. And, having accepted this arrangement in December of
[23] 2007 it is your understanding, is it not, that Universal in
[24] fact declined to enter into a direct license arrangement with
[25] DMX?

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[1] A. Yes, they did.

[2] Q. Now let me show you what's been premarked as RX 31. Beg
[3] your pardon. You can leave that with the witness, let's also
[4] show him 32. Hold on to 31 for a few minutes.

[5] I have put in front of you as RX 32, a document which
[6] is a December 7, 2007 letter agreement on BMI letterhead
[7] addressed to Songs of Universal Inc. signed by Del Bryant as
[8] president and counter-signed by Officers of Universal.

[9] Do you see that?

[10] A. Yes, I do.

[11] Q. Do you recognize this to be the commemoration of the
[12] guarantee arrangement that was executed, entered into with
[13] Universal?

[14] A. Yes, I am. Yes, I do.

[15] MR. RICH: I offer that into evidence at this point,
[16] your Honor.

[17] MR. FITZPATRICK: No objection.

[18] THE COURT: Received.

[19] (Respondent's Exhibit 32 received in evidence)

[20] Q. Looking at paragraph 1 -- and your Honor, I'm going to
[21] because of the commercial sensitivity for BMI because of the
[22] actual terms, I'm going to make reference to these including a
[23] demonstrative but not read numbers into the record for the next
[24] few minutes to accommodate confidentiality concerns without
[25] needing to worry about the public in the courtroom. If that's

[1] performances of Universal music comes out to around \$106,000.

[2] Does that sound about right?

[3] A. That sounds about right.

[4] Q. Okay.

[5] And so, if one wanted to compare the level of the
[6] guarantees set forth in the December 7, 2007 letter agreement
[7] against \$106,000 you would simply, obviously, compare the
[8] \$106,000 to the numbers depicted in paragraph 1. Is that
[9] correct?

[10] A. Yes.

[11] Q. And you get the order of magnitude difference which, again,
[12] I won't speak into the record because it will give away the big
[13] number. Okay?

[14] A. Okay.

[15] Q. Now, I want to show you a demonstrative which does a little
[16] bit of math and I will hand that out to counsel and the Court,
[17] please. The first of these starts at the caption: Universal
[18] guarantee is blank times royalties actually earned.

[19] Do you have that one in front of you?

[20] A. Yes, I do.

[21] Q. This, I think, accurately captures the math we just went
[22] through first identifying the 2006 royalties on the DMX line,
[23] yes?

[24] A. Yes.

[25] Q. Attributing the DMX portion to them?

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[1] acceptable.

[2] If you would look at paragraph 1 of this document and
[3] see the numbers set forth in A, B and C?

[4] A. Yes.

[5] Q. I take it those are the annual sums for the years 2008,
[6] 2009 and 2010 that were guaranteed to Universal, is that
[7] correct?

[8] A. That is correct.

[9] Q. And do you still have from before lunch RX 27?

[10] A. Yes, I do.

[11] Q. If you would turn to the second page of RX 27, please?

[12] A. Yes, sir.

[13] Q. And looking at the top half of that page remember we talked
[14] about the \$192,000 sum that Sony had received?

[15] A. Yes.

[16] Q. As a comparable number to Universal for 2006 the number
[17] next to it 392994?

[18] A. Yes, it is.

[19] Q. Just to be clear, those were performances reported on the
[20] DMX line but which in fact represented more than simply the DMX
[21] performances as we discussed, correct?

[22] A. Correct.

[23] Q. Now, if one does the math off of the 392994 and applies the
[24] same 27 percent factor, I will represent to you that the
[25] amounts of the 2006 distributions attributable to DMX

[1] A. Yes.

[2] Q. The product of that, the \$600,000 set forth there?

[3] A. Yes.

[4] Q. And then setting forth comparatively the amount of the
[5] Universal guarantee for 2008 as against that, correct?

[6] A. Yes.

[7] Q. Okay.

[8] Now, can one counsel from each side come up, please?

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[1] (At side bar)

[2] **THE COURT:** What is BMI's interest in the
[3] confidentiality of these numbers?

[4] **MR. FITZPATRICK:** The only number is the actual --
[5] **THE COURT:** Excuse me.

[6] **MR. FITZPATRICK:** The only number that we are
[7] concerned about is the actual dollar amount of the guarantee.

[8] **THE COURT:** Yes.

[9] **MR. FITZPATRICK:** And we -- I mean, it is a number we
[10] prefer to keep confidential because it is not known among all
[11] the affiliates exactly how every affiliate is treated so it
[12] would be -- the sensitivity would be with respect --

[13] **THE COURT:** The term affiliate meaning?

[14] **MR. FITZPATRICK:** Other song writers and publishers,
[15] like Sony for example, would then know how much we guaranteed
[16] to Universal. Or EMI would know or whatever.

[17] **THE COURT:** And your reasons for preferring that they
[18] not know are what?

[19] **MR. FITZPATRICK:** We just prefer to keep our dealings
[20] with individual affiliates confidential, your Honor, so that
[21] they don't all know each other's business.

[22] **THE COURT:** No more than that.

[23] **MR. FITZPATRICK:** No more than that, your Honor.

[24] **THE COURT:** Hmm?

[25] **MR. FITZPATRICK:** No, no more than that, your Honor.

[1] (In open court)

[2] **BY MR. RICH:**

[3] **Q.** Mr. O'Neill, come back to RX 32 for a moment, please?

[4] **A.** Yes.

[5] **Q.** Am I correct that the amounts of the annual guarantees
[6] provided to Universal by BMI for 2008 was the sum of \$600,000?

[7] **A.** Correct.

[8] **Q.** 2009 a sum of \$625,000? And for 2010 the sum of \$650,000?

[9] **A.** That's correct.

[10] **Q.** And so that the relative ratio between the pre-existing
[11] levels of royalties attributable to DMX which had been earned
[12] by Universal of \$106,000 represented roughly one sixth of the
[13] level of the annual guarantee made pursuant to this document?

[14] **A.** Yes, that is correct.

[15] **Q.** Thank you.

[16] Now, let's do some more math, please, and we can use
[17] as an aid this second demonstrative which is titled: Expected
[18] Universal Royalties Under BMI Best Case Scenario.

[19] Do you have that?

[20] **A.** Yes, I do.

[21] **Q.** And if you need a calculator at any point, let me know,
[22] otherwise I have done the math. But, you are free to check.

[23] Assuming that all of DMX' approximately 77,000
[24] locations as of the fourth quarter of 2007 were to be licensed
[25] by BMI or had been licensed by BMI at the fee level which BMI

[1] **THE COURT:** Well, this is a public proceeding
[2] affecting various aspects of public business and you're
[3] offering this so that I will rely on it in reaching a decision.

[4] **MR. RICH:** Indeed.

[5] **THE COURT:** And I'm expect to be candid about --

[6] **MR. SALZMAN:** Excuse me. May I join the conference,
[7] your Honor?

[8] **THE COURT:** Sure.

[9] And I'm expected to be candid about my reasons and the
[10] facts underlying them and --

[11] **MR. FITZPATRICK:** Your Honor, I have been given
[12] permission to waive it, if that makes life easier. I just got
[13] it, so.

[14] **THE COURT:** You waive the confidentiality?

[15] **MR. FITZPATRICK:** I do. Yes, your Honor.

[16] **THE COURT:** Good. You can use the numbers.

[17] **MR. RICH:** Thank you very much.

[18] **THE COURT:** I think it is preferable that you do in a
[19] public court.

[20] **MR. RICH:** Thank you.

[1] seeks, \$36, approximately, a location, by my math that would
[2] generate in royalty income to BMI approximately \$2.8 million
[3] for the year.

[4] Do you accept that?

[5] **A.** That premise, yes.

[6] **Q.** Yes.

[7] **A.** I believe at the time, though, they had about a hundred
[8] thousand locations based on the e-mail we had from Ann Sweeney.
[9] The deal offer that DMX made to Sony listed their locations at
[10] a hundred thousand.

[11] **Q.** Okay. We can redo the math simultaneously if you would
[12] like?

[13] **A.** No.

[14] **Q.** Let's stay with the 77 and we can up it by whatever amount,
[15] okay?

[16] On the premise that that was the actual accounting
[17] time that would generate about \$2.8 million to BMI, second line
[18] of the demonstrative, yes?

[19] **A.** Yes. The math works, yes.

[20] **Q.** Now, you testified earlier that BMI takes anywhere from 17
[21] to 20 percent off for expenses so I took the more conservative
[22] 17 percent figure off the top from the \$2.8 million best case?

[23] **A.** Okay.

[24] **Q.** Which would leave about \$2.3 million available for
[25] distribution on account of DMX performances?

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[1] A. Okay.

[2] Q. Now, that would be both to writers and to publishers,
[3] correct?

[4] A. That is correct.

[5] Q. And so BMI will not, as a matter of practice, ever --
[6] ever -- distribute less than 50 percent of such a sum to its
[7] writers; is that correct?

[8] A. Out of every dollar, yes, 50 cents gets allocated to.

[9] Q. So, out of every \$2.3 million it will never distribute less
[10] than \$1.15 million or half that sum to writers, correct?

[11] A. Yes, that's our practice.

[12] Q. So, I have deducted that and that would leave you a
[13] publisher share available for distribution to all participating
[14] publishers of \$1.15 million, is that correct?

[15] A. Yes.

[16] Q. Now, we earlier established that Universal's share of the
[17] 70 percent share held by the four majors was about 29 percent.

[18] Do you recall that?

[19] A. Yes.

[20] Q. And therefore of the total universe of dollars if you took
[21] 29 percent of 70 percent you would be at 20 percent of total
[22] publisher distributions, correct?

[23] A. Again, with -- yes, wasted on your representation.

[24] Q. Sounds right, yes?

[25] So, if you took 20 percent which would be Universal's

[1] you are going to ask me to conclude from it. Is it that BMI
[2] contemplated if it attained the \$36 per location figure that it
[3] would recover a great deal more than it was guaranteeing?
[4] Under this arrangement?

[5] MR. RICH: No. As the next --

[6] THE COURT: What comparison are you going to draw to
[7] what point?[8] MR. RICH: As the next five minutes I think will
[9] demonstrate, your Honor, there was a presentation and a series
[10] of representations made to the BMI board that were inaccurate
[11] in terms of BMI's expectation as to recoupment and I will leave
[12] it to your Honor to conclude as to the relevance of it. It
[13] seemed to us and it seems to us to be strong evidence that BMI
[14] was going to throw as much money at stopping a second major
[15] publisher from entering into a direct license as it needed to
[16] irrespective of any realistic probability of recovery to the
[17] point of, etc.

[18] Let me just finish the examination.

[19] THE COURT: As long as I understand the overarching
[20] point. You may proceed.

[21] BY MR. RICH:

[22] Q. If you would turn back to what's already in evidence as RX
[23] 31, please?

[24] A. Yes, sir.

[25] Q. I take it that a memorandum was prepared for a committee of

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[1] rightful share of the maximum anticipated income if you earned
[2] the full \$36 against an available \$1.15 million, by our math
[3] you come down to a grand total of \$230,000, correct?

[4] A. Under your example, yes.

[5] Q. Yes.

[6] And the 2008 guarantee to Universal which was the
[7] lowest of the three years was \$600,000, correct?

[8] A. That is correct.

[9] Q. And so, that's not yet even half of the guaranteed sum
[10] under your best case, is that correct?[11] A. This isn't our best case. This wasn't how we figured it
[12] out.

[13] Q. Okay.

[14] But, this would be the math, would it not, if you
[15] achieved \$36.36 from Universal? \$36?

[16] What is incorrect about how this?

[17] A. I think this mathematically works correctly.

[18] Q. Now, BMI needed to get its board approval for this
[19] transaction, is that correct?

[20] A. Yes, it is.

[21] Q. This wasn't an everyday transaction, was it?

[22] A. A guarantee, I think, always needs board approval.

[23] Q. And in connection with that board approval --

[24] THE COURT: Mr. Rich, I'm not sure whether you are

[25] through with this point but I have already lost track of what

[1] the board to approve the guarantee arrangement?

[2] A. Yes, it was.

[3] Q. Do you recognize RX 31 as that documentation?

[4] A. I do.

[5] Q. And it went to a committee of the board whose initials are
[6] the PRRC, is that correct?

[7] A. That is correct.

[8] Q. For the record, what is the PRRC?

[9] A. I don't quite know what the initials stand for. Performing
[10] rights royalty committee potentially?[11] Q. Okay. And I take it this is the board committee to which a
[12] guarantee of a request of this sort is directed?

[13] A. Correct.

[14] Q. In the middle of the first page of this document under
[15] history of prior guarantees and earnings, do you see that?

[16] A. Yes, I do.

[17] Q. In fact, there was no history of prior guarantees for
[18] Universal, was there?

[19] A. It listed last guarantee amount zero.

[20] Q. Yes.

[21] A. Yes.

[22] Q. The history was that they were like any other publisher,
[23] they lined up and got their share of distributions in the
[24] ordinary course, correct?

[25] A. That is correct.

[1] Q. Such that in the second quarter '06 to the first quarter
[2] '07 that amount as reported here was \$359,613, correct?

[3] A. That is correct.

[4] Q. And, am I correct that that number in fact representing
[5] earnings is not simply from DMX but from roughly 200 music
[6] publishing -- pardon me commercial music services?

[7] A. Correct.

[8] Q. As we discussed earlier. Okay.

[9] Indeed, if you turn to the second page of this which
[10] is the board memorandum of justification, it is pointed out in
[11] the third paragraph, is it not, "it is important to note that
[12] the earnings listed above are comprised of DMX and some smaller
[13] background music services."

[14] Do you see that?

[15] A. Yes, I do.

[16] Q. And then it goes on: But on a going forward basis BMI will
[17] be breaking out DMX as its own line item on our royalty
[18] statements.

[19] Correct?

[20] A. That is correct.

[21] Q. Now, this memorandum doesn't anywhere say, however, to the
[22] board, does it, that solely 27 percent of three hundred 59
[23] thousand some odd dollars is represented by DMX. It didn't
[24] quantify it, did it?

[25] A. No, it did not.

[1] So, when you advised the board that on the assumption
[2] that BMI would achieve, if BMI prevails in your words here,
[3] prevails in the rate court proceeding and in the appeal, the
[4] result you say is that it is likely that Universal's earnings
[5] will more than triple, meaning from \$12 to \$14 to \$36?

[6] A. More than triple. It could go to \$49 at this point in
[7] time. We were debating whether to use the ASCAP high end.

[8] Q. You don't say more than four or five or six times, you say
[9] more than triple; right?

[10] A. Which means more than three times.

[11] Q. Okay. I'm not going to quibble about that. But, the fact
[12] of the matter is you testified for the last two days here,
[13] didn't you, and the record is replete with evidence saying that
[14] when asked by publishers you said compare \$12 to \$14 to \$36
[15] which is the prevailing established rate in the industry, that
[16] is a more than tripling we are looking to get from DMX.

[17] You didn't say to those publishers we are looking for
[18] \$49, did you?

[19] A. No. I said that we are looking at the established blanket
[20] rate which is in the market and which is more than three times
[21] what DMX is currently paying.

[22] Q. Can you cite to single commercial music services entity
[23] ever that BMI was getting more than \$49 from per location?
[24] Music Choice? Any of those?

[25] A. No, I can't.

[1] Q. To your knowledge, was the board otherwise notified about
[2] that, about that percentage, the \$359,000, what it represents?

[3] A. I don't have that knowledge.

[4] Q. Now, the memo goes on in the same paragraph that I was just
[5] quoting from to advise the board that if BMI prevails in what
[6] is now this litigation and receives a rate at its requested
[7] \$36.36, then, quote: It is likely that the Universal earnings
[8] will more than triple and the expected return on the guarantee
[9] when all retroactive periods are applied would be in the 75 to
[10] 100 percent range.

[11] Do you see that?

[12] A. Yes, I do.

[13] Q. But, if you look back at the last demonstrative here, under
[14] BMI's \$36.36 scenario, based on the assumptions underlying this
[15] at least, the most that Universal could have hoped to achieve
[16] was some \$230,000, correct?

[17] A. Under your demonstrative?

[18] Q. Yes?

[19] A. That's correct.

[20] Q. And if we did the math for a hundred thousand locations
[21] instead I will indicate that the number would be instead of
[22] \$230,000, \$300,000 or barely 50 percent of the first year
[23] guarantee, correct?

[24] A. Yes. Under your demonstrative, that's correct.

[25] Q. Under our demonstrative, okay.

[1] What I said was that we were modeling numbers for the
[2] direct -- for the adjustable fee blanket license that exceeded
[3] \$36.36.

[4] Q. You didn't say that to the board?

[5] A. No, we didn't. We just said more than three times.

[6] Q. Yes, \$12 to \$36; correct?

[7] A. More than three times.

[8] Q. You didn't say more than four or five or six times, did
[9] you?

[10] A. No, I did not.

[11] Q. No.

[12] So you think your math was good to the board, yes?

[13] A. Yes, I do.

[14] Q. And you believe at the time this memo went to the board,
[15] based on everything you knew about the levels of historic
[16] distributions that Universal had achieved, based on your best
[17] case outcome in a rate court case, based on how BMI distributes
[18] monies, based on its knowledge that DMX represented only 27
[19] percent of all publisher line distributions and that if you did
[20] that math, even assuming a hundred thousand DMX locations the
[21] most that Universal would ever see, best case, is \$300,000,
[22] that your representation to the board that it was likely that
[23] Universal's guarantee would be recouped to the 75 to 100
[24] percent range was fair and accurate, yes?

[25] **MR. FITZPATRICK:** Object. That misstates his

[1] testimony. Each of the premises that he just gave was not
[2] consistent with the witness' testimony, your Honor.

THE COURT: Was not?

MR. FITZPATRICK: It was not. That was not the witness' testimony, your Honor. All of the numbers that Mr. Rich just gave were not -- the hypothetical is not consistent with the witness' testimony.

The witness' testimony was that they were not looking at \$36.36 per location; and that's the premise of the question.

THE COURT: Yes. The question asks you to accept the premises not in your own view but in the view that he takes of the matter.

THE WITNESS: In the view that Mr. Rich lays out here I don't know if I would say that it -- again, he doesn't have any retroactive periods which this note has also in it. The note to the board has that when all retroactive periods are applied the recoupment would be in 75 to 100 percent range. I don't see that in Mr. Rich's demonstrative so I don't think it is comparing apples and apples.

BY MR. RICH:

Q. How would any retroactive year, pick any one you want, how would the math come out dramatically different than what is on the demonstrative?

A. If you look at 6,000 the 27 percent from this analysis would translate to Universal. And if you increased that by

[1] **A.** No, it was not.

[2] **Q.** I take it that BMI has told Warner/Chappel that it stands ready to consider a similar accommodation to that accorded to Universal if and when requested by Warner/Chappel, is that correct?

[3] **A.** That is incorrect.

[4] **Q.** We will discuss that with Ms. Smith who had something to say on that subject.

[5] All of this activity, I take it, the payment of what Mr. Arrow from Universal called an extraordinary guarantee at his deposition in this case, all of this occurred, I take it, on account of the direct line activities of a single BMI licensee, DMX, that represents less than three tenths of one percent of BMI's annual revenues, is that correct?

[6] **A.** DMX requested it from Universal. Universal contacted BMI to see if we could match it and that's how it started. In terms of DMX' overall fees compared to total revenues, I will take your representation that it is about 3 percent, if that.

[7] **Q.** Notwithstanding their small scale, this was a very important plugging of the dike, wasn't it, for BMI?

[8] **A.** I don't consider it a plugging of the dike, I consider it responding to a publisher that has requested something from BMI -- a major publisher and one of our biggest customers.

[9] **Q.** Pay an extraordinary guarantee, yes?

[10] **A.** Matching what they've been offered by an outside entity.

[1] three times, that's at least \$300,000 a year. There is two and a half years open where DMX would pay a blanket rate under their scenario from 2005 to the end of 2007 which would add to your numbers, an additional three, six, almost \$850,000 on top of that. So, that's why we would still have to get fees for that period of time as we testified yesterday in the AFBL quote. We suggested that they just take the \$36.36 rate for those two and a half years.

[2] **Q.** You also testified that it is possible that you had gotten \$49 or something like that, yes?

[3] **A.** I said it was something BMI was exploring and modeling internally as a potential rate quote.

[4] **Q.** That was not communicated to the board, was it?

[5] **A.** No, it was not.

[6] **Q.** Now, BMI hadn't offered the composers whose BMI works are represented by Universal, the same terms that were offered to Universal, has it?

[7] **A.** No, we have not.

[8] **Q.** So that if the Universal advance were not to earn out the effect would be, would it not, that per performance by DMX of BMI works Universal would have received a greater sum than the maximum 50 percent which BMI's operating rules call for, correct?

[9] **A.** Under that scenario, yes, that would happen.

[10] **Q.** Was that discussed with the board?

[1] They say this is what they believe my catalog is worth, why won't you --

[2] **Q.** Which two months earlier you declined to do as another major, Sony?

[3] **A.** And I believe we declined Sony conveyed that \$2.71 million guarantee or the \$1.3 million publisher was both -- I mean was BMI only. We couldn't come close to that. We subsequently found out that that was for BMI and ASCAP. I think if it was BMI only we may have come close to it, Mr. Rich.

[4] **Q.** So, the fact as you write in the fourth paragraph of the board memo that, quote: More and more publishers are being asked by DMX to directly license. We have been notified that at least one major publisher has entered into a direct license with DMX and has accepted the guaranteed payment from DMX wasn't what made the decision to extend this extraordinary guarantee, right?

[5] **A.** It was the fact that we felt we could compete in this level and get a return on the investment.

[6] **Q.** And so, as you further write, quote: Assuring that BMI licenses in this market is important was not a factor or significant factor in extending this extraordinary guarantee, right?

[7] **A.** No. Again, I believe we should have a license in this genre.

[8] **Q.** And having the ability to license Universal's music to help

[1] solidify BMI's position not only for this negotiation but for
 [2] the background music industry as a whole also wasn't a major
 [3] consideration, huh?

[4] **A.** It was a consideration, yes.

[5] **MR. RICH:** I have nothing else, your Honor. Thank you
 [6] very much.

[7] **THE COURT:** Thank you, Mr. Rich.

[8] REDIRECT EXAMINATION

[9] **BY MR. FITZPATRICK:**

[10] **Q.** Hello again, Mr. O'Neill.

[11] **A.** Good afternoon.

[12] **Q.** If we could start where we left off with the Sony and
 [13] Universal guarantees?

[14] I just want to be clear. in both cases what BMI was
 [15] being asked was to match a proposal that DMX had made to those
 [16] two entities; correct?

[17] **A.** That is correct.

[18] **Q.** And during your cross-examination we looked at some of the
 [19] spreadsheets that you had put together, particularly in
 [20] connection with the Sony guarantee request, correct?

[21] **A.** That is correct.

[22] **Q.** Now, the proposals that you were being asked to match, were
 [23] those \$25 royalty pool proposals or were those proposals by DMX
 [24] to those publisher of guaranteed money?

[25] **A.** They were guaranteed money.

[1] **Q.** And do you recall the amount of the guarantee? How was
 [2] that guarantee calculated by DMX?

[3] **A.** I believe it was calculated at one and a half times what
 [4] BMI was paying the entity.

[5] **Q.** So, when you were thinking about whether or not to match
 [6] those offers to Sony and -- to Sony and Universal that DMX had
 [7] made, were you thinking of those offers as \$25 royalty pool
 [8] offers? Or were you thinking of those offers as offers of 150
 [9] percent of what BMI had been paying in the past?

[10] **MR. RICH:** Objection. Leading, your Honor.

[11] **THE COURT:** Overruled.

[12] **A.** I was initially thinking of what the actual number was, how
 [13] did they arrive at the number which was one and a half times.
 [14] I didn't even know the Sony license had a \$25 concept in it
 [15] until I got it about, very recently under the interim
 [16] agreement.

[17] **Q.** Okay. Let's talk briefly. You were asked a few questions
 [18] on cross-examination about a TruSonic amendment. Do you recall
 [19] that?

[20] **A.** Yes, I do.

[21] **Q.** And you specifically discussed whether or not there have
 [22] been any incremental cost to BMI as a result of that amendment?

[23] **A.** Yes.

[24] **Q.** Now, has TruSonic actually sought to exclude any locations
 [25] under that agreement, to your knowledge?

[1] **A.** Licensing and performing rights.

[2] **Q.** And the performing rights people, as Mr. Rich pointed out,
 [3] do not report to you, correct?

[4] **A.** They do not.

[5] **Q.** Who they report to?

[6] **A.** Alison Smith.

[7] **Q.** Do the licensing people report to you?

[8] **A.** Yes, they do.

[9] **Q.** And if we can be clear about the chart, the new hire on the
 [10] first row, will that be a licensing -- will that person report
 [11] to you?

[12] **A.** Yes, they will.

[13] **Q.** And in the second row, Kwasnik and Steinberg report to you,
 [14] correct?

[15] **A.** Correct.

[16] **Q.** And Tortora and Hunke report to Smith and the Smith is a
 [17] reference to Alison Smith?

[18] **A.** That is correct.

[19] **Q.** Under the next row, the per-program supervisor and new hire
 [20] and Steinberg are all licensing people?

[21] **A.** They are.

[22] **Q.** And then the Smith, Tortora and Hunke are performing rights
 [23] but are there any dollars claimed for those people?

[24] **A.** No, there aren't.

[25] **Q.** And then in the following row are all of the entrants other

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[1] than Smith, Tortora and Hunke, licensing people who would
 [2] report to you?
 [3] **A.** They are.
 [4] **Q.** And, again, is any money requested for Smith, Tortora and
 [5] Hunke?
 [6] **A.** No, they're not.
 [7] **Q.** And the same thing with the next row, Smith, Tortora and
 [8] Hunke are performing rights people and, again, no money is
 [9] requested, correct?
 [10] **A.** That is correct.
 [11] **Q.** I think in discussing this chart before you mentioned the
 [12] per-program license. Does BMI have a per-program department?
 [13] **A.** Yes, we do.
 [14] **Q.** Who does that department report to?
 [15] **A.** Michael Steinberg.
 [16] **Q.** And who does Mr. Steinberg report to?
 [17] **A.** Myself.
 [18] **Q.** When was that department created?
 [19] **A.** That was -- actually, when I joined BMI in December of '94
 [20] we had a per-program department already up and running and that
 [21] was for the interim local television per program.
 [22] **Q.** And how many people are currently in that department?
 [23] **A.** I believe there are five people in that department.
 [24] **Q.** Has your experience with that department factored in, in
 [25] any way, to the creation of the estimates on this chart?

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[1] by more than 8 percent in each year of the correct, correct?
 [2] **A.** That is correct.
 [3] **Q.** In fact, if you take a look at tab 5 quickly, just to put a
 [4] number on it, if you can look at the very last row on page 15,
 [5] could you give the actual numerical growth that Play Network
 [6] had over the term of the agreement?
 [7] **A.** Yes. They started the agreement with 11,017 locations and
 [8] they've ended the agreement with 32,595 locations.
 [9] **Q.** And you have testified in fact that it was reasonable for
 [10] Play Network to pay a fee that worked out to \$24.75 in the last
 [11] year of the agreement, yes?
 [12] **A.** Yes. In year five of the agreement that's what it called
 [13] for.
 [14] **Q.** Now, did DMX grow during the course of the 2004 to 2009
 [15] time period?
 [16] **A.** My understanding is they actually lost locations.
 [17] **Q.** I think you also testified that it would be reasonable to
 [18] give DMX a license on the same -- with the same economic
 [19] parameters as the license given to Play Network, correct?
 [20] **A.** That is correct.
 [21] **Q.** And could you explain what you mean by that?
 [22] **A.** Yes. I would offer him the same form agreement --
 [23] **Q.** I'm sorry?
 [24] **A.** -- as I offered to Play Network or Music Choice or
 [25] TruSonic.

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[1] **A.** Yes, it has.
 [2] **Q.** Could you explain that?
 [3] **A.** I was there when in '94 I took over responsibility for the
 [4] television per-program department right when we went to a new
 [5] form of per program. We also went from three people to five
 [6] people at that point in time to handle the workload involved.
 [7] I just know from -- I think I may have said this
 [8] yesterday -- in dealing with a license agreement while it might
 [9] appear black and white in reality of administering that license.
 [10] it is never as clear cut as it seems. There are disputes all
 [11] the way through, especially with the new license. I will say
 [12] that the man-hours spent on the early days of per program were
 [13] tremendous. And today it is not nearly as intensive as when it
 [14] first started but it is still requires five people to
 [15] administer.
 [16] **Q.** Okay, last topic.
 [17] I think Mr. Rich spent some time with you establishing
 [18] the fact that Play Network paid license fees in the final year
 [19] of the contract that worked out to \$24.77 per location,
 [20] correct?
 [21] **A.** I think it was \$24.75.
 [22] **Q.** \$24.75. If that's not what I said, I apologize.
 [23] **A.** It is burned in there now.
 [24] **Q.** As Mr. Rich established, that was because Play Network grew

[1] **Q.** And what would the result of that agreement have been for
 [2] DMX?
 [3] **A.** They effectively, using rough math, they would have been
 [4] well north of the \$36.36.
 [5] **Q.** And what is your actual offer to DMX in this proceeding?
 [6] **A.** Just to cut it off at \$36.36.
 [7] **MR. FITZPATRICK:** Thank you. I have no other
 [8] questions.
 [9] I did have one administrative matter, your Honor. On
 [10] direct I was notified by the court reporter I identified an
 [11] exhibit as tab 14. I failed to point out that it was
 [12] Petitioner Exhibit 0126. It had been received but I didn't
 [13] properly identify it.
 [14] **THE COURT:** If a given location of one customer is
 [15] fairly priced at \$25 a year, why isn't a given location of
 [16] another customer also fairly priced at \$25 a year even though
 [17] the other business arrangements, the history of how the \$25 was
 [18] reached at is different between the two customers?
 [19] **THE WITNESS:** I think this form agreement, you kind of
 [20] have a bell curve, if you will. At the low end of the bell
 [21] curve you have the \$24.75. At the high end I think Mr. Rich
 [22] showed us some numbers around \$500 or \$600 per location. The
 [23] average fee over that term ended about \$34.52. I think if --
 [24] when we originally did this agreement we were going to have
 [25] customers on all different ends of it being that the base was

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[1] laid and we wouldn't ever receive less money that we've
[2] negotiated in that first contract here. It was only what was
[3] the value of that incremental dollars to that license.

[4] So, when I looked at it and when I reviewed this, your
[5] Honor, I looked at it as a bell curve saying, yes, we have some
[6] customers down here but we have some here, where is the
[7] majority of them.

[8] **THE COURT:** Thank you.

[9] **MR. FITZPATRICK:** May Mr. O'Neill be excused, your
[10] Honor?

[11] **MR. RICH:** I have no recross, your Honor.

[12] **THE COURT:** Thank you, Mr. O'Neill. You are excused.

[13] **THE WITNESS:** Thank you very much, your Honor.

[14] **MR. FITZPATRICK:** Should we move directly to our next
[15] witness, your Honor, or would you like to take a break, first?

[16] **THE COURT:** I take it that the short summary of that
[17] answer, Mr. O'Neill, is that the fact that one given location
[18] might be priced at \$25 does not mean that all locations should
[19] be priced at \$25.

[20] **THE WITNESS:** That is correct.

[21] **THE COURT:** Because of the other provisions of release
[22] that result in quite different prices under other circumstances
[23] covered by the lease?

[24] **THE WITNESS:** That is absolutely correct.

[25] **THE COURT:** Thank you.

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[1] **THE WITNESS:** Thank you, your Honor.

[2] **THE COURT:** Were you suggesting, do you want a recess
[3] now?

[4] **MR. FITZPATRICK:** I could call the next witness or if
[5] we are going to take a short break we can take it right now.
[6] Whatever is convenient.

[7] **THE COURT:** Normally I take it about half an hour
[8] later are but if for some reason you want to do it now, you
[9] can.

[10] **MR. FITZPATRICK:** No, we can get started now.

[11] **THE COURT:** Okay.

[12] (Continued on next page)

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[1] **MR. FITZPATRICK:** Your Honor, for our next witness BMI
[2] calls Mr. Thomas Annastas.

[3] **THOMAS ANNASTAS,**

[4] called as a witness by the Plaintiff,
[5] having been duly sworn, testified as follows:

[6] **THE DEPUTY CLERK:** Please state your name and spell
[7] your last name slowly for the record.

[8] **THE WITNESS:** My name is Thomas Annastas,
[9] A-n-n-a-s-t-a-s.

[10] **MR. FITZPATRICK:** Your Honor, may I approach with a
[11] binder of exhibits?

[12] **THE COURT:** Sure.

[13] **DIRECT EXAMINATION**

[14] **BY MR. FITZPATRICK:**

[15] **Q.** Good afternoon, Mr. Annastas .

[16] **A.** Good afternoon.

[17] **Q.** Are you currently employed by BMI?

[18] **A.** Yes.

[19] **Q.** Where are you located at BMI?

[20] **A.** In Nashville, Tennessee.

[21] **Q.** How long have you been with BMI?

[22] **A.** 37 years.

[23] **Q.** And currently, what's your position at BMI?

[24] **A.** Vice president of licensing.

[25] **Q.** What do you do as vice president of licensing?

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[1] Q. And what is the American Hotel Association?

[2] A. The American Hotel & Lodging Association represents most of
[3] the hotels in the country, and they, as representation they
[4] negotiate this license and other things for their members.

[5] Q. Now, what types of music use does this license at tab 1
[6] cover?

[7] A. It covers live and recorded music.

[8] Q. And how many, about how many hotels have signed this
[9] license?

[10] A. About 4500 hotels.

[11] Q. Now, you mentioned that this was negotiated with the AHLA.
[12] Who negotiated it on BMI's behalf?

[13] A. On BMI's behalf it was Mike Steinberg and myself.

[14] Q. And when did those negotiations occur?

[15] A. This last agreement was 1999 and it self renews every year.

[16] Q. Could you just generally describe those negotiations? What
[17] were they like?

[18] A. The Hotel Association had a negotiating committee, and they
[19] had representations from everything from the casinos all the
[20] way down to the smaller hotels, and they probably lasted
[21] approximately two and a half to three years.

[22] Q. Was the fee one of the terms that was negotiated?

[23] A. Absolutely. The fee was probably the biggest part of the
[24] negotiation at the time that we started negotiations. At the
[25] time we started negotiations we wound up being paid less than

[1] Q. And if you could just using those schedules briefly
[2] describe for his Honor how the fee would be calculated under
[3] this license for a hotel.

[4] A. Schedule A basically deals with the live music and
[5] entertainment of the hotel. So if a hotel had live music for
[6] the year 2009, they would tell us how much entertainment cost
[7] they had spent, and, for example, if it was \$100,000, you'd go
[8] down the bracket of annual live music and entertainment cost,
[9] you see it says 100,000 to 119,999.99, and their annual fee for
[10] music alone would be \$3,582.

[11] Q. How about an example where a hotel had no live music at all
[12] but just played let's say recorded music in the lobby, for
[13] example? How would their fee be calculated?

[14] A. Their fee would be calculated on Schedule B. It says
[15] recorded music only fee, no live music performed. So, for
[16] example if the hotel had 115 rooms, it's based on the number of
[17] rooms. You would go and the second bracket is 101 to 300
[18] rooms, and you'd go across, it says 2009 without AV and their
[19] fee would be \$401.

[20] Q. What's the without AV refer to?

[21] A. Audio visual, if they didn't have TV's in their lobby or
[22] whatever.

[23] Q. Now, just to be clear, if a hotel gets the only music that
[24] it uses from a commercial music service like DMX, do they need
[25] this license?

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[1] ASCAP and our commitment to them was to get parity with ASCAP.

[2] Q. Are there other situations where BMI negotiates direct
[3] licenses with industry associations analogous to the AHLA?

[4] A. Yes.

[5] Q. Could you give some examples of those?

[6] A. The symphony area. The American Symphony Orchestra League
[7] negotiated a license with us. Colleges represented by NACUBO
[8] and ACE, that's a negotiated licensing. The Bowling
[9] Proprietors Association, North American Concert Promoters
[10] Association, and there's probably at least a dozen more.

[11] Q. Does BMI have a preference between negotiating with a
[12] industry-wide group like that versus developing a license on
[13] its own without negotiation?

[14] A. We reach out to every association that we possibly can and
[15] when we reach out to them, the first thing we ask for them is
[16] to negotiate a license, and we've been doing that for quite a
[17] few years.

[18] Q. Why does BMI do that?

[19] A. It's more favorable for both sides that if we have a
[20] negotiated rate all of their members would understand the
[21] agreement, they'd help us educate and it's a win-win for both
[22] sides.

[23] Q. If you could turn to page 3 of tab 1, and you see there's a
[24] Schedule A, a Schedule B and Schedule C there.

[25] A. Okay. Yes.

[1] A. No.

[2] Q. How is the hotel licensed if they get their music solely
[3] through a commercial music service?

[4] A. If it was DMX, DMX would not only supply the music, but
[5] they would supply the coverage of the license agreement with
[6] BMI and they would pay us, the average would be \$36.36.

[7] Q. Not for DMX currently, but under the final commercial music
[8] services agreement?

[9] A. Yes.

[10] Q. If you could take a look at tab 2 of the binder, please.
[11] And this is Joint Exhibit 0781. If you can take a look at that
[12] and identify it, please?

[13] A. It's a license agreement for the restaurant, nightclubs and
[14] bars. It's called the music license for eating and drinking
[15] establishments.

[16] Q. And about; how many restaurants, nightclubs and bars have
[17] signed this license with BMI?

[18] A. Since its interception probably well over 70,000.

[19] Q. And again, what types of music use that restaurants
[20] nightclubs and bars might make does this license agreement
[21] cover?

[22] A. Both live and recorded.

[23] Q. Do different types of music use get different rates under
[24] this agreement?

[25] A. Yes. If you look at the calculation page on page 3, it

[1] starts off just like the other one with live music only, and
 [2] it's based on the frequency of music per week, frequency of
 [3] live music per week, and it's also based on rate per year per
 [4] occupant. So if the restaurant has a band playing three nights
 [5] a week, you basically go down to that first schedule and the
 [6] rate would be \$4.35 and if they --

[7] Q. Can I just ask you, I just want to make sure we're
 [8] following. You're in the live music box?

[9] A. Yes, first category.

[10] Q. Multiple singers, instrumentalists?

[11] A. Yes, I am.

[12] Q. I'm sorry, go ahead. I just wanted to make sure where you
 [13] were.

[14] A. You're in the multiple singer instrumentalists because
 [15] you're a band, four or five members. Because it's three
 [16] nights, it would go to the category of two to four nights and
 [17] the rate there is \$4.35. If they had a hundred occupants in
 [18] their restaurant as an established fire occupancy code you
 [19] would multiply the hundred times \$4.35 and they pay us \$435 a
 [20] year if they had no other music used.

[21] Q. Now, the hotel agreement didn't use a per occupant rate,
 [22] correct?

[23] A. No, it was based on entertainment cost.

[24] Q. And what's the metric for the hotel agreement for recorded
 [25] music only?

[1] A. Recorded music, it's the number of rooms.

[2] Q. So why the difference? Why use occupants for a restaurant
 [3] and rooms for a hotel?

[4] A. I think part of what a restaurant has is a fire occupancy,
 [5] so based on the fire occupancy that they have, it's an
 [6] established code that we know exactly how many the restaurant
 [7] can have within their restaurant, and when we talk to the
 [8] industry, they thought it was a good indication of how many
 [9] people would be in and out of the place.

[10] Q. If you could, again, back on page 3 of the restaurant
 [11] agreement at tab 2, I think you took us through a live
 [12] entertainment example, but could you do an example for a
 [13] restaurant, that the only music it uses is recorded music?

[14] A. If you go to number 2, the second box, it says recorded
 [15] music, and recorded music here is tapes, records, free play
 [16] jukebox, DJ's, VJ's, CD's, or other digital music like iPods.
 [17] And the rate there is \$2.55 per occupant. If they have a
 [18] hundred occupants, you'd multiply that out and it would be
 [19] \$2.55 times 100, which is \$255. But if that's the only music
 [20] used, the minimum fee on this license is \$320.

[21] Q. And is there a reference to that minimum fee on this page?

[22] A. Yes. If you go down to right under category six or number
 [23] six, it says annual minimum fee if over \$320. Enter annual fee
 [24] here. If less, 320 or less, enter annual minimum fee of \$320.

[25] Q. And again, if the restaurant, if the only music that a

[1] restaurant used was recorded music and it got all of that music
 [2] from a commercial music service like DMX, would the restaurant
 [3] need the license we've been looking at?

[4] A. No, they wouldn't.

[5] Q. Now, was this license agreement, the restaurant agreement,
 [6] negotiated?

[7] A. No, it wasn't.

[8] Q. Why not?

[9] A. We had reached out to the National Restaurant Association
 [10] and they weren't interested, but what we did was develop a rate
 [11] structure and contact all of the state restaurant associations
 [12] and we had a focus group that came in and took a look at the
 [13] agreement, rate structure and had some input as to how they
 [14] thought it would work better and helped us with some of the
 [15] definitions for the members.

[16] Q. Did you incorporate any of their input?

[17] A. Yes, we did.

[18] Q. Does BMI currently have any arrangements with any of the
 [19] state or national restaurant associations?

[20] A. We've currently got about 60 or 62 state association
 [21] programs with them and we offer the state associations a
 [22] discount for their members in exchange for them marketing and
 [23] educating their members about BMI and the license agreement.

[24] Q. Are there any other industries where there's been an
 [25] analogous situation that is not a negotiated license but focus

[1] groups have come in?

[2] A. Yes. We've got the fitness industry. We've worked with
 [3] them, one of the associations, is IRSNA, which is the
 [4] International Racquet Sports and Health Association, and it's
 [5] where all fitness center members took a look at this along with
 [6] the executive director of the association.

[7] Q. Do the industry groups that we've been talking about
 [8] provide any education functions on BMI's behalf?

[9] A. Yes, they do.

[10] Q. Could you explain that?

[11] A. Again, going back to these discount programs that we've
 [12] developed with them, everything from their website has material
 [13] on their website about BMI and that they can link directly to
 [14] us so they know exactly how to explain BMI to their members.
 [15] We've also developed Q and A's, FAQ sheets they can distribute
 [16] directly to their members. We've done press, we've been
 [17] invited to some of their board meetings and we've made
 [18] presentations at the conventions whereby we can educate their
 [19] members, but the bulk of the education comes from the
 [20] association itself.

[21] Q. Why is that important to BMI, why is that education
 [22] function?

[23] A. Again, copyright is a tough thing to understand as it is,
 [24] and when you get down to these industries, whether it's a hotel
 [25] or a restaurant or a fitness center, they really don't

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[1] understand copyright and understand performing rights either.
 [2] So it's much better to educate them through the association,
 [3] because it's a party that they believe in, they understand and
 [4] it's in forms of education that they help present to their
 [5] members.

[6] **Q.** If you could turn to tab 3, please, in your binder. And
 [7] this is Joint Exhibit 0782. If you could take a look at that
 [8] and identify it, please?

[9] **A.** This is the license agreement that was developed for the
 [10] retail establishments.

[11] **Q.** And what kinds of establishments does BMI include within
 [12] retail establishments?

[13] **A.** It ranges from department stores like Nordstrom's to
 [14] Limited to beauty salons, any type of service situation.

[15] **Q.** What kind of music use by retail establishments does this
 [16] license cover?

[17] **A.** It covers both live and recorded.

[18] **Q.** Can you estimate about how many retail establishments have
 [19] signed this particular license?

[20] **A.** Probably around 6,000.

[21] **Q.** Now, was this license negotiated?

[22] **A.** No.

[23] **Q.** Why not?

[24] **A.** We reached out to the retail, National Retail Federation
 [25] and the NFIB, which is the National Federation of Independent

[1] **Q.** And how much would the commercial music service pay for
 [2] that location if it had the last final agreement with the
 [3] users?
 [4] **A.** 36.36.

[5] **Q.** Why the disparity in rates from your perspective,
 [6] Mr. Annastas?

[7] **A.** I think over the years the background music service has
 [8] given us volumes of locations, and we gave them a volume
 [9] discount.

[10] **Q.** And what's your view of that discount today, Mr. Annastas?

[11] **A.** I think over the years, things have changed, especially in
 [12] the last decade with technology and how we do business at BMI,
 [13] and all performing rights organizations, where I think
 [14] technology has made it more readily available for us to get to
 [15] these individual locations. So I think the difference in what
 [16] we get directly is, it's ten times more in most instances, and
 [17] I think that's more of a disparity than it should be.

[18] **Q.** If I could ask you to turn to tab 4 of the binder.

[19] **A.** Okay.

[20] **Q.** And we have there Joint Exhibit JX 0132. The Court has
 [21] seen it before. If you could just identify that document,
 [22] please?

[23] **A.** It's the license agreement with Muzak LLC.

[24] **Q.** Were you involved with the negotiation of this agreement?

[25] **A.** Yes.

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[1] Businesses, and they really had no issue that their members
 [2] felt performing rights were important to them, so they had no
 [3] interest in negotiating.

[4] **Q.** Can you turn to page 3 of the agreement?

[5] **A.** Okay.

[6] **Q.** And again, we have a license fee schedule. Maybe if you
 [7] could just take the recorded music only example and explain to
 [8] the Court how the fee would be calculated under this agreement.

[9] **A.** If we go to Schedule 1A and it says recorded music, one to
 [10] nine locations, one to nine licensed retail premises, minimum
 [11] fee of not less than the lowest class fee applies to each
 [12] licensed retail premise. That means the smallest fee would be
 [13] \$207.24, if you go into the categories, but it's broken down
 [14] into class and it's class 1 through 9.

[15] The second category is total square footage of each
 [16] licensed retail premise.

[17] Third category is the annual license fee for audio
 [18] only performances and then fourth category is annual license
 [19] fee for audio visual performances. If you had a square footage
 [20] of your store retail establishment about 4,000, you'd go to
 [21] class 3 and it's 2501 to 5000 square feet. If you had audio
 [22] only it would be \$402.27.

[23] **Q.** And again, if the retail establishment got all its music
 [24] from a commercial music service would it need this license?

[25] **A.** No.

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[1] **Q.** Who else was involved on both sides of the negotiation?

[2] **A.** From BMI it was Marvin Berenson, John Shaker and myself,
 [3] and from Muzak it was Mike Zendan and Rod McCinnis of Abry.

[4] **Q.** How long did those negotiations last?

[5] **A.** From the first negotiation started in 1994 when the old
 [6] agreement expired, and then we had the rate court action, so in
 [7] reality, that itself, that period was about eight years, and
 [8] then the last negotiation that brought this agreement to
 [9] fruition was started in early 2002 after the rate court hearing
 [10] ended.

[11] **Q.** And when did the negotiations culminate in an agreement?

[12] **A.** 2004.

[13] **Q.** What was BMI's goal in these negotiations with Muzak?

[14] **A.** I think that the key we were trying to get to was as close
 [15] to parity with ASCAP.

[16] **Q.** What was the basis for that goal?

[17] **A.** ASCAP had paid 49.50 per location, and as Mike had
 [18] testified before, we were getting anywhere between 10 and \$12
 [19] per location. We also had a per location rate on the
 [20] off-premise, on the on-premise in the old agreement that was
 [21] \$20.50. So we actually thought that if we could increase the
 [22] market share from the previous agreement, we should get closer
 [23] parity with ASCAP.

[24] **Q.** When you say market share, what are you referring to?

[25] **A.** The amount of BMI music that was being played on commercial